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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Call Center Technologies, Inc.

Serial No. 75621155
Serial No. 75621157

Michael J. Foycik, Jr., Esq. for Call Center Technologies,
Inc.

Ellen Awrich, Trademark Examining Attorney, Law Office 116
(Meryl Hershkowitz, Managing Attorney).

Before Cissel, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

The two applications involved herein were filed on
January 15, 1999, by Call Center Technologies, Inc. (a
Delaware corporation) to register on the Principal Register
the marks CLICK-TO-CALL (application Serial No. 75621155)
and CLICK2CALL (application Serial No. 75621157), both for
services identified, following amendment, as "providing

local and long distance telephone services via global computer networks for the electronic transmission of voice and data" in International Class 38. Applicant asserts, in each application, a bona fide intention to use the mark in commerce.

The Examining Attorney has refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark (CLICK-TO-CALL or CLICK2CALL), when used in connection with applicant's services, would so resemble the registered mark CLICK-N-CALL for "computer software, namely, software for enabling voice or other auditory communications over computer and/or telephone network" in International Class 9.¹

When the refusal to register was made final, applicant appealed in each application. Applicant and the Examining Attorney have filed briefs, but applicant did not request an oral hearing.

In view of the common questions of law and fact which are involved in these two applications, and in the interests of judicial economy, we have consolidated the

¹ Registration No. 2217646, issued January 12, 1999.

applications for purposes of final decision. Thus, we have issued this single opinion.

We affirm the refusals to register. In reaching this conclusion, we have followed the guidance of the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Examining Attorney contends that each of applicant's marks (CLICK-TO-CALL and CLICK2CALL) is very similar to the registered mark CLICK-N-CALL, as all of the marks use the identical words "click" and "call," and all use non-distinctive connectors, "to" or "2" or "n," and one of applicant's marks uses hyphens to separate the words and the connector, as does registrant's mark; that each of applicant's marks is similar in sound, appearance, connotation and overall commercial impression to the cited registered mark; that the goods and services are related

and consumers understand that registrant's computer software for enabling voice or other auditory communications over a computer and/or a telephone network and applicant's local and long distance telephone services via global computer networks are used for the same purpose, specifically, the transmission of voice over computer networks; and that because applicant's services and registrant's goods will be used in voice communication with call center representatives over the Internet, the same consumers will encounter the goods and services.

Applicant contends that the marks, considered in their entirety, are different; that applicant's services and the cited registrant's goods travel through distinct channels of trade to different consumers, with applicant's services directed to the end consumers, while registrant's goods are directed to the providers of such telephone services; that the relevant purchasers are sophisticated; that there have been no instances of actual confusion; and that the owner of the cited registration did not oppose a third party's application to register the mark CLICK TO CALL (application Serial No. 75494850), although applicant did successfully oppose the third-party application.

Turning first to a consideration of the cited mark and each of applicant's marks, we find that they are very

similar in sound, appearance, connotation and commercial impression. All of the involved marks consist of the words "click," "call" and a connector ("to" or "2" or "n"). In addition, applicant's CLICK-TO-CALL mark and the registered mark both include hyphens. The minor differences are not likely to be recalled by purchasers seeing the marks at separate times. Under actual market conditions, consumers do not have the luxury of a side-by-side comparison of the marks; and further, we must consider the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Thus, the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

Applicant's marks and the registered mark are highly similar in connotation, all connoting how easy it is to use applicant's services or registrant's goods relating to telephone networks by simply "clicking" in order to place a "call."

Turning next to a consideration of the respective goods and services, it is well settled that goods and/or

services need not be identical or even competitive to support a finding of likelihood of confusion; it being sufficient that the goods and/or services are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992); and *In re International Telephone and Telegraph Corporation*, 197 USPQ 910 (TTAB 1978).

It has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Also, confusion in trade can occur from the use of similar (or the same) marks for products, on the one hand, and for services involving those products, on the other

hand. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *Safety-Klean Corporation v. Dresser Industries, Inc.*, 518 F.2d 1399, 186 USPQ 476 (CCPA 1975); and *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983), and cases cited therein.

In this case, the registered mark is for "computer software, namely, software for enabling voice or other auditory communications over computer and/or telephone network," while applicant intends to offer the service of "providing local and long distance telephone services via global computer networks for the electronic transmission of voice and data." The Examining Attorney submitted printouts of numerous third-party registrations, based on use in commerce, listing these types of goods and services in connection with the same marks. See, for example, Registration No. 2612061 for "computer telephony systems comprised of computer hardware and computer operating software that integrates telephone systems with computer systems, ..." and "telephone communication services in the nature of providing computer telephone communications services, including call center services and interactive voice response telephony services"; Registration No. 2585702 for "computer hardware and software for use in transmitting and receiving audio, video, text and data

files via local area networks, wide area computer networks and global computer networks, ... computer hardware and software for use in digital telephony" and "providing high speed telecommunications connections to computer and communications networks; digital telephony communication services, ..."; Registration No. 2355506 for "telecommunications equipment, namely telephone handsets and telephone systems comprised of private branch exchange (PBX), hybrid private branch exchange (PBX) and key telephone systems, and software for use therewith for providing electronic voice and data messaging,..." and "telecommunications services, namely, local and long-distance calling services"; and Registration No. 2508935 for "computer software for use over telecommunications networks, namely, communications software for use in transmitting messages, data and multimedia information over a global network, ..." and "telecommunications services, namely, electronic transmission of messages and data, ... and telephone communications services."

When considering the third-party registrations submitted by the Examining Attorney, we are aware that such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. Such third-party registrations nevertheless have some probative

value to the extent they may serve to suggest that such goods and services are of a type which emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

The Examining Attorney also relies on applicant's promotional materials submitted in response to an inquiry from the Examining Attorney, which include the following statement:

Is Click2Call an Internet telephony service? YES- Click2Call™ provides the ability for your customers to talk over the Internet using Voice over Internet Protocol, or "VoIP" technology. Click2Call™ allows your customers equipped with multimedia PCs to speak with a call center representative on the same telephone line, without disconnecting from the Internet.

While applicant contends that the trade channels are "entirely different," applicant does not explain what those specific different trade channels are for these goods and services. To the contrary, however, the Examining Attorney has submitted printouts of third-party registrations indicating the same entities offer both of these goods and services under the same mark.

Applicant argues that the purchasers of registrant's goods are the providers of communication over the Internet

and/or a telephone network, whereas the purchasers of applicant's services are the end users, who are not concerned with how applicant provides the service. We are not persuaded by applicant's argument regarding entirely different and distinct purchasers because (i) the identifications of goods and services are not restricted in any way with regard to purchasers (or trade channels); and (ii) there is evidence of record to the contrary.

The Examining Attorney submitted printouts from two third-party web sites, both of which refer to and discuss how end consumers will use registrant's software. See the following quotes therefrom:

Net Steps in with Support for Customer

...

Another innovative solution for easier Web support comes from Boulder-based Gold Systems' [registrant] Click-N-Call technology [web site omitted]. By installing Intel Internet phone software, customers can go to a Web site, click on a button with their mouse, and the phone automatically starts up, connecting to a call center or Web-based business.

...

Although users need a sound card, speakers, microphone and free Internet telephone software you can download from Gold's site, it's still worth the time and effort.

www.coloradowit.org; and

Sun, Microsoft Courting Boulder Java Developer

...

The Boulder-based Gold Systems, Inc., a communications software development company, has spun off a subsidiary Click-N-Call Inc., which has entered the Internet telephony field with a namesake product that allows Netizens to click a button on a company's Web site and be connected to a customer service representative on a telephone. The Web user can speak to the representative through their multimedia computer without disconnecting from the Internet. Because the call is made using the Internet connection, customers can view Web pages while talking to the representative. The agent can then guide the customer through the Web site, answering questions, taking orders or providing other services.

...

www.bcbr.com.

Thus, the record shows that registrant's consumers include end users, i.e., the general public. Applicant's arguments that registrant's customers consist only of the providers of telephony services and that these customers are sophisticated purchasers are unsupported by evidence. Moreover, no such restrictions are in applicant's and/or registrant's identifications of goods. Thus, even if evidence of specific trade channels and/or sophisticated consumers were of record, it would not be persuasive.

Even if the consumers are relatively sophisticated, i.e., consumer-literate purchasers, they are likely to believe that the parties' respective goods and services

come from the same source, if offered under the involved substantially similar marks. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *Aries Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, footnote 17 (TTAB 1992).

We find the respective goods and services are closely related, and could be sold through the same channels of trade, to the same classes of purchasers, which include the public at large.

Although applicant's attorney has represented that there have been no instances of actual confusion since applicant commenced use of its mark in March 1999, this unsubstantiated statement is entitled to no consideration.² *Majestic Distilling Co.*, supra, 65 USPQ2d at 1205 ("With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value."). Importantly, in this case, the applications are based on Section 1(b) (bona fide intention to use the mark)

² Applicant included for the first time with its brief on appeal, a declaration of Dean Vlahos, applicant's president, that applicant commenced use of the marks CLICK-TO-CALL and CLICK2CALL in March 1999. (The declaration does not refer to the lack of actual confusion in any manner.) This evidence is untimely under Trademark Rule 2.142(d) and the Board has not considered it. Even if it had been considered, it would not alter our decision herein.

of the Trademark Act, and there is no evidence of applicant's and the cited registrants' geographic areas of sales, or the amount of the sales under the respective marks. Further, there is no information from the registrant. In any event, the test is likelihood of confusion, not actual confusion. See Weiss Associates Inc. v. HRL Associates Inc., supra; and In re Kangaroos U.S.A., 223 USPQ 1025 (TTAB 1984).

Finally, applicant's argument that the owner of the cited registration did not oppose a third-party's mark CLICK TO CALL is simply irrelevant. There is no information of record as to why registrant did not act against the third-party application, and this argument involves speculation by applicant. See In re Dixie Restaurants, supra.

Decision: The refusal to register under Section 2(d) is affirmed in each application.